

SERVICE DATE - NOVEMBER 12, 2003

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34346

DALLAS AREA RAPID TRANSIT–ACQUISITION EXEMPTION–CERTAIN ASSETS OF
REGIONAL RAIL RIGHT OF WAY COMPANY

Decided: November 5, 2003

On May 5, 2003, Dallas Area Rapid Transit (DART), a political subdivision of the State of Texas, filed a verified notice of exemption¹ under 49 CFR 1150.41 to acquire from its affiliate, Regional Rail Right of Way Company (RRROW) certain railroad assets consisting of approximately 56 miles of railroad line and related trackage located in Dallas, Tarrant, and Collin Counties, TX (the lines).² Consummation of the transaction was expected to occur on or about May 12, 2003. On that date, DART filed a motion to dismiss the notice of exemption, claiming that the transaction, as described in the notice and as set forth in the transfer agreement, deed, and freight easement attached to its motion, is not subject to the Board's jurisdiction. The motion to dismiss will be granted.

BACKGROUND

DART entered into a transfer agreement with RRROW to acquire RRROW's right, title, and interest in the right-of-way, trackage, and other physical assets of the lines. DART states that it is acquiring the lines for possible passenger rail operations, but does not intend to conduct freight rail operations or materially interfere with common carrier freight rail service on the lines. RRROW will retain an exclusive, perpetual easement on the lines to conduct, or contract with third parties to conduct, freight rail operations. The transfer agreement sets forth the terms and conditions that will govern rail operations on the lines.

¹ Notice of the filing was served and published in the Federal Register on June 3, 2003 (68 FR 33225).

² DART proposes to acquire the following segments of RRROW's right-of-way: (1) the line of railroad extending between milepost 632.27 near Ft. Worth and milepost 578.20 near Wylie, and (2) the existing trackage between Tower 19 and Oakland Avenue in East Dallas.

Pursuant to the freight easement, RRROW will retain exclusive control and management of third party common carrier freight rail operations on the lines.³ RRROW will have the right to use (or authorize a third party contractor to use) the lines in connection with common carrier freight rail operations and any related activities (including dispatching, maintenance, repair, and reconstruction reasonably related to the freight railroad operations). Although DART will obtain the right to lease, license, or convey additional easements on the lines to other persons or entities, it will be required to ensure that these leases, licenses, or easements do not materially interfere with RRROW's rights under the freight easement.

The transfer agreement, deed, and freight easement will give DART the property and contract rights it requires to operate passenger rail service on the lines in the future if it elects to do so. However, RRROW will retain the exclusive right and obligation to provide common carrier freight rail service, by itself or through third party operators, on the lines. DART will not acquire sufficient property or contract rights to provide such common carrier freight rail service or to materially interfere with freight rail operations on the lines.⁴

According to DART, the asset acquisition involved here is not subject to Board jurisdiction, and its consummation would not make DART a common carrier, because it will not conduct freight operations or hold itself out to the public as willing or able to do so, citing Maine, DOT-Acq. Exemption, ME. Central R. Co., 8 I.C.C.2d 835 (1991) (State of Maine). DART states that RRROW

³ RRROW is a Texas non-profit, non-stock corporation formed by DART to retain and manage any common carrier freight rail obligations on railroad corridors DART uses or plans to use for passenger rail operations. RRROW, a Class III rail carrier, does not conduct or intend to conduct freight rail operations, but as owner of the lines and holder of the common carrier obligation thereon has entered into trackage rights agreements that enable third party freight railroads to provide common carrier freight rail service on the lines.

⁴ In conjunction with RRROW's transfer of the lines to DART subject to its retention of the freight easement, RRROW also will acquire from DART an exclusive, perpetual freight rail operating easement on approximately 92.2 route miles of railroad owned by DART in Collin, Dallas, Denton, Grayson, and Rockwall Counties, TX (the DART lines). See Regional Rail Right of Way Company-Acquisition and Operation Exemption-Lines of Dallas Area Rapid Transit, STB Finance Docket No. 34347 (STB served June 3, 2003). RRROW will allow the Dallas, Garland & Northeastern Railroad, Inc., to continue providing common carrier freight rail operations on the DART lines pursuant to an existing trackage rights agreement with DART and RRROW. Upon consummation of RRROW's acquisition of the freight rail operating easement on the DART lines, DART's common carrier status on such lines as a result of its ownership thereof will be transferred to RRROW. This motion to dismiss does not apply to the transaction at STB Finance Docket No. 34347.

will retain an exclusive, perpetual easement for providing, or allowing third parties to provide, common carrier freight rail service on the lines.

DISCUSSION AND CONCLUSIONS

DART's motion to dismiss will be granted, and the proceeding will be discontinued. The primary issue here is whether the proposed acquisition by DART of certain rail assets of RRROW (a rail carrier) requires regulatory authorization. It is well established that when an entity, including a state, acquires a freight rail line that has not been abandoned, it must seek Board approval under 49 U.S.C. 10901. See Common Carrier Status of States, State Agencies, 363 I.C.C. 132, 133 (1980), aff'd sub nom. Simmons v. ICC, 697 F.2d 326 (D.C. Cir. 1982). Board authorization is not required, however, when only the physical assets will be conveyed and the common carrier rights and obligations that attach to the line will not be transferred. See State of Maine, 8 I.C.C.2d at 836-37.

In the typical sale of a non-abandoned rail line, the new owner is presumed to succeed the former owner in assuming the obligation to ensure that freight rail service continues over the line. Here, however, no common carrier rights or obligations are being transferred, and DART will not hold itself out here as a common carrier performing freight rail service.⁵ Rather, DART will acquire only the railroad right-of-way and certain related improvements for possible passenger rail operations, while RRROW will retain a permanent easement to conduct freight railroad operations on the lines. Although DART will have the right to lease, license, or convey additional easements on the lines to other persons or entities, this will not materially interfere with RRROW's ability to provide freight rail service to current or future customers. RRROW's retained easement will ensure its ability to continue to provide freight service over the lines, and the transaction will not interfere with RRROW's fulfillment of its common carrier obligations.

On the basis of representations made by DART that it will not hold itself out as a common carrier of freight, as well as the Board's review of the transfer agreement, freight easement, and deed submitted into the record, which demonstrate that this transaction will not impair RRROW's ability to fulfill its common carrier obligations, no authorization is required for the transfer of the rail assets in this case. Therefore, DART's notice of exemption will be dismissed, and this proceeding will be discontinued.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

⁵ Accordingly, this transaction will not confer common carrier status on DART as to these lines.

It is ordered:

1. DART's motion to dismiss the verified notice of exemption in this proceeding is granted.
2. The proceeding is discontinued.
3. This decision is effective on its service date

By the Board, Chairman Nober.

Vernon A. Williams
Secretary